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Nos. 07-1059, 07-1078

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In The Supreme Court of the United States

UNITED STATES OF AMERICA; USEC INC.; and UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; and THE AD HOC UTILITIES GROUP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that under the plain language of the antidumping statute, 19 U.S.C. § 1673, contracts for the sale of uranium enrichment services are not sales of merchandise, and therefore that sales of enrichment services under those contracts are not subject to the statute.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the members of the Ad Hoc Utilities Group (hereinafter "AHUG") joining in this Brief in Opposition list their respective parent companies and nonwholly owned subsidiaries as follows:

1. The parent company of respondent Dominion Energy Kewaunee, Inc. is Dominion Resources, Inc. Dominion Energy Kewaunee, Inc. has no nonwholly owned subsidiaries.

2. The parent company of respondent Dominion Nuclear Connecticut, Inc. is Dominion Resources, Inc. Dominion Nuclear Connecticut, Inc. has no nonwholly owned subsidiaries.

3. The parent company of respondent Duke Energy Carolinas, LLC is Duke Energy Corporation. Duke Energy Carolinas, LLC has no nonwholly owned subsidiaries.

4. The parent company of respondent Entergy Services, Inc. is Entergy Corporation. Entergy Services, Inc. has no nonwholly owned subsidiaries.

5. Respondent Exelon Corporation has no parent and three nonwholly owned subsidiaries: Sithe Energies, Inc., Comed, and PECO.

6. The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

7. Respondent Nebraska Public Power District has no parent or nonwholly owned subsidiaries. It is a political subdivision of the State of Nebraska.

8. The parent company of respondent PPL Susquehanna, LLC is PPL Corporation. PPL Susquehanna, LLC has four nonwholly owned subsidiaries: PPL Electric Utilities Corporation, PPL Energy Supply LLC, PPL Montana LLC, and PPL Transition Bond Company LLC.

9. The parent company of respondent Progress Energy Carolinas, Inc., formerly known as Carolina Power & Light Company, is Progress Energy, Inc. Progress Energy Carolinas, Inc. has no nonwholly owned subsidiaries.

10. The parent company of respondent Progress Energy Florida, Inc., formerly known as Florida Power Corporation, is Progress Energy, Inc. Progress Energy Florida, Inc. has no nonwholly owned subsidiaries.

11. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has three nonwholly owned subsidiaries: Edison Mission Energy (issuing equity or debt securities through Edison Mission Energy Funding Corp., Midwest Generation LLC, Midwest Finance Corp., and Edison Mission Holdings Co.), Edison Capital (through its financing subsidiary Edison Funding Co.), and SCE Funding LLC.

12. The parent company of respondent Southern Nuclear Operating Company, Inc. is the Southern Company. Southern Nuclear Operating Company, Inc. has no nonwholly owned subsidiaries.

13. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Union Electric Company has three nonwholly owned subsidiaries: Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP.

14. The parent company of respondent Virginia Electric & Power Company is Dominion Resources, Inc. Virginia

Electric & Power Company has no nonwholly owned subsidiaries.

15. The parent company of respondent Wolf Creek Nuclear Operating Corporation is Westar Energy, Inc. Wolf Creek Nuclear Operating Corporation has one nonwholly owned subsidiary, Great Plains Energy, Inc.

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Respondent the Ad Hoc Utilities Group ("AHUG") is comprised of fifteen domestic utilities that represent the majority of commercial nuclear power generation in the United States.[1] AHUG respectfully submits this brief in opposition to the petitions for certiorari submitted by the United States ("Government") and USEC Inc. and the United States Enrichment Corporation (collectively, "USEC").[2]

STATEMENT OF THE CASE

This case involves an administrative proceeding under the provisions of the Tariff Act of 1930. Those provisions authorize the Government to impose offsetting customs duties ("antidumping duties") when the Department of Commerce ("Commerce") finds, among other conditions, that imports of foreign merchandise are being sold at a lower price in the United States than they are sold in the home country market of the foreign producer or exporter.

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[1] The members of the Ad Hoc Utilities Group are Dominion Energy Kewaunee, Inc.; Dominion Nuclear Connecticut, Inc.; Duke Energy Carolinas, LLC; Entergy Services, Inc.; Exelon Corporation; Florida Power & Light Company; Nebraska Public Power District; PPL Susquehanna, LLC; Progress Energy Carolinas, Inc.; Progress Energy Florida, Inc.; Southern California Edison Company; Southern Nuclear Operating Company; Union Electric Company (d/b/a AmerenUE); Virginia Electric & Power Company; and Wolf Creek Nuclear Operating Corporation.

[2] The Government's and USEC's petitions are respectively referenced hereinafter as "Gov't Pet." (Gov't App.) and "USEC Pet." (USEC App.).

The antidumping proceeding at issue involved imports of low enriched uranium ("LEU") from Eurodif S.A. ("Eurodif") of France. Commerce evaluated purchases by American electric utility companies of a foreign manufacturing service – the enrichment of the utilities' uranium for ultimate use in commercial nuclear reactors – and deemed them to be purchases of merchandise, LEU. On appeal, the Court of Appeals for the Federal Circuit concluded that the contracts at issue were for the sale of services, not LEU, and that the antidumping statute unambiguously did not apply to sales of services.

Neither the Government nor USEC raise any issues worthy of Supreme Court review. Specifically, the decision of the Federal Circuit challenged by the Petitioners involves a routine application of the standard of deference established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 487 U.S. 837 (1984). The Federal Circuit has not decided an important question of law not previously settled by this Court's decisions on the review of agency decisions, or with which relevant decisions of the Court are in conflict. Moreover, the dispute arises in the context of the highly complex and unique marketplace for nuclear fuel manufacturing services. The fact specific nature of the issues in this case raise no issues of general application and none worthy of certiorari review by this Court. Accordingly, the instant petitions should be denied.

A. The Enrichment Of Uranium Is An Intermediate Manufacturing Process In The Production Of Nuclear Fuel Assemblies

Utilities use fuel rod assemblies containing enriched uranium in nuclear reactors as part of a process in which water is heated to produce steam, which in turn passes through turbines to generate electricity.

Typically, utilities arrange for the production of their own nuclear fuel rod assemblies through multiple contracts for manufacturing services. The utility generally begins the nuclear fuel production process by purchasing a quantity of milled uranium ore. It then contracts with a conversion service provider to chemically transform the ore into gaseous uranium hexafluoride (UF_6), commonly referred to as uranium "feedstock." Next, the utility separately contracts with an enrichment service provider to enrich the UF_6 in the fissionable isotope U^{235} to a level specified by the utility. As a final step, the utility contracts with a fabrication service provider to chemically transform the enriched uranium hexafluoride into an oxide (UO_2), press the oxide into pellets, encapsulate the pellets in tubes, and bundle the tubes into fuel assemblies for insertion in the utility's nuclear reactors. The utility retains ownership of the uranium in all of its

chemical forms throughout these stages of nuclear fuel production.[3]

All mined uranium originally contains 0.711 percent of fissionable isotope U^{235}. Enrichment is the process by which the heavier isotopes of uranium are separated from the lighter isotopes to increase the percentage of U^{235} in a portion of the uranium. Enrichment results in a quantity of enriched uranium and a waste stream of depleted uranium, known as "tails." This process involves a trade-off between the amount of uranium feedstock used and the amount of energy expended (the energy is referred to as Separative Work Units, or "SWU"). The same quantity of LEU enriched to the same U^{235} isotope level (or "assay") can be produced by using either less uranium feedstock and more SWU (to separate more U^{235} from the "tails" portion of the uranium), or more uranium feedstock and less SWU. When purchasing enrichment services, utilities deliver uranium feedstock to the enricher, specify the required level of enrichment, and pay for the service of enriching that uranium to the desired

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3 *See Low Enriched Uranium From France*, 66 Fed. Reg. 65,877, 65,879 (Dep't of Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) (hereinafter *Low Enriched Uranium from France Final AD Determination)* (Gov't App. 230a-231a).

level, based on the amount of SWU expended by the enricher.[4]

Because the amount of uranium feedstock provided and the level of enrichment required varies from transaction to transaction, two utilities purchasing the same amount of SWU may have very different quantities of LEU delivered to them after the enrichment processing service is completed. Similarly, deliveries by enrichers of the same quantity of LEU to two utilities may reflect the use of different quantities of uranium feedstock and enrichment services.[5]

Under enrichment services contracts the utilities retain ownership of the uranium feedstock they provide to the enrichers. Thus, the enrichers do

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[4] During the antidumping proceeding at issue, the enrichment process represented approximately 65 percent of the value of LEU. *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1325 (Ct. Int'l Trade 2003) (*"USEC I"*) (Gov't App. 205a). The price of milled uranium ore has since increased by approximately 800 percent (from under $8 per pound in 2000 to $73 in 2008) and now represents a greater portion of the LEU's value. Ux Consulting, *Ux Current and Historical Price Indicators*, *available at* http://www.uxc.com/review/uxc_g_price.html.

[5] Alternatively, a utility sometimes purchases completed LEU through a contract for "enriched uranium product" ("EUP"), which it subsequently arranges to be fabricated into nuclear fuel assemblies. Under an EUP contract, the utility pays the seller a price that reflects all elements of the LEU's value, including the milled uranium, the conversion services, and the enrichment services. *USEC I*, 259 F. Supp. 2d at 1314-15 (Gov't App. 182a-185a). The application of the antidumping law to EUP transactions is not at issue in this proceeding.

not report that feedstock as an asset on their books, and have no legal obligation to pay property, sales, or income taxes on it. The enrichers do not know the cost of the uranium feedstock that the utilities provide, and such values can vary considerably, because utilities purchase uranium concentrates under long-term contracts from a variety of sources in different countries at different prices. *USEC I*, 259 F. Supp. 2d at 1314-15 (Gov't App. 182a-185a). The courts have consistently viewed enrichment services contracts as contracts for services, in a variety of legal contexts.[6]

This method of contracting separately for enrichment services was originally established by the U.S. Government. The existing 104 operating nuclear plants in the United States were ordered in the 1960s and 1970s. At the time the utilities entered into contracts for the construction of their nuclear reactors, they were required to sign contracts for uranium enrichment services with the U.S. Government. *USEC I*, 259 F. Supp. 2d at 1316 (Gov't App. 186a). During that period there was no

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[6] *See, e.g., Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002) (applying the Contract Disputes Act); *Centerior Service Co. v. United States*, No. 95-103C, 1997 U.S. Claims LEXIS 323, at *19 (Dec. 17, 1997) (applying the Uniform Commercial Code); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996) (applying the Uniform Commercial Code); *see also DOE Uranium Enrichment Program*, 51 Fed. Reg. 11,811, 11,812 (Dep't of Energy Apr. 7, 1986) (request for expression of interest for participation) (describing enrichment as "an arrangement whereby uranium supplied by a customer is enriched in uranium-235 content by DOE and then returned to that customer" and stating that such "[s]ervices are provided under contracts which are generally signed with publicly or privately owned utilities.").

alternative source of enrichment services. Later, the U.S. Government lifted its own monopoly and allowed foreign entities to provide enrichment services to utilities, and eventually privatized its own enrichment operation, which became USEC. 42 U.S.C. § 2297h-10. Two years after it was privatized in 1998, USEC initiated antidumping proceedings against imports of LEU from its two main competitors, who have facilities in four European countries. The appeal at issue arises from the proceeding against Eurodif.[7]

B. The Antidumping Law

The antidumping statute authorizes Commerce to impose antidumping duties if it "determines that a class or kind of *merchandise is being*, or is likely to be, *sold* in the United States at less than fair value [and such sales cause material

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[7] USEC simultaneously initiated countervailing duty proceedings against the same imports of LEU, which were the subject of separate court appeals. (Countervailing duty proceedings involve investigations of whether foreign governments are providing subsidies that benefit exports.) In the countervailing duty proceeding involving Eurodif's exports from France, the Federal Circuit also held that an enrichment contract was a purchase of a service and not of a good. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1364-65 (Fed. Cir. 2005) *("Eurodif I")* (Gov't App. 24a-27a). The Government and USEC did not seek certiorari review of that decision, and the countervailing duty order consequently was revoked. The antidumping investigation of the other European enricher, Urenco, resulted in a determination of no dumping. *Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 Fed. Reg. 65,886, 65,888 (Dep't of Commerce Dec. 21, 2001) (notice of final determinations of sales at not less than fair value).

injury or threat thereof]." 19 U.S.C. § 1673 (2000) (emphasis added). In general, merchandise is deemed sold at less than fair value if its price in the United States is less than its price in the exporter's home country market.

The purpose of the antidumping law is to allow special customs duties to be imposed to offset price discrimination by particular sellers in the country subject to an antidumping investigation, based on an examination of actual sales. The law provides detailed rules on how transactions are to be analyzed and compared, including how adjustments are made to account for differences in the circumstances of sales – *e.g.*, differences in transportation costs, whether a transaction reflects a quantity discount, whether sales are made at the wholesale or retail level, etc. 19 U.S.C. §§ 1677a - 1677b (2000). Accordingly, the law requires a specific examination of each sale of merchandise to support a determination that sales are being made at less than fair value, and separate antidumping duty rates are calculated for each foreign producer and exporter that participates in the proceeding. 19 U.S.C. § 1677f-1 (2000). Generalized assumptions about transactions are not permitted.

Transactions in contract manufacturing services such as uranium enrichment are not unusual, and Commerce previously developed policies for applying the antidumping statute to contract manufacturing. In recognition that the antidumping statute applies only to sales of merchandise and not to sales of services, Commerce issued a regulation distinguishing between sales of

merchandise, which are relevant in an antidumping analysis, and sales of manufacturing services associated with such merchandise, which are not. The regulation provides in pertinent part that "[Commerce] will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2007).[8] Except for uranium enrichment services, Commerce has relied upon Section 351.401(h) to establish a consistent practice – confirmed by the courts – of finding that contracting for manufacturing services does not constitute a relevant sale of the resulting merchandise. *See, e.g., Taiwan Semiconductor Manufacturing Co., Ltd. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) ("Commerce's use of 'relevant sale' ... furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.").[9] On that basis, Commerce previously has held that sales of contract manufacturing services cannot be the basis of a determination of sales of merchandise at less than fair value.

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[8] "Toll producers" are entities that produce merchandise for other parties through contract manufacturing service arrangements.

[9] *See also Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 56,308, 56,318 (Dep't of Commerce Oct. 19, 1999) (notice of final determination of sales at less than fair value) (treating sales of Taiwanese contract manufacturing service provider as services, not sales of merchandise).

C. The Proceedings Below

At the request of USEC, in December 2000 Commerce initiated antidumping and countervailing duty investigations of imports of LEU from France, Germany, the United Kingdom and the Netherlands. It published its final determination in the antidumping proceeding involving France on December 21, 2001. *Low Enriched Uranium from France Final AD Determination*, 66 Fed. Reg. at 65,877 (Gov't App. 220a-262a). Commerce's determination that Eurodif had made sales at less than fair value was based primarily on sales of enrichment services.

The question whether enrichment contracts should be considered sales of services or of goods was thoroughly briefed during the administrative proceedings. In its initial determination, Commerce stated that "[w]hile we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU." *Id.* at 65,884-65,885 (Gov't App. 254a-255a). Moreover, it was uncontested that the utilities did not sell the LEU produced from their feedstock. Nonetheless, Commerce concluded that "[i]t does not matter whether the producer/exporter [Eurodif] sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise

entering the commerce of the United States." *Id.* at 65,885 (Gov't App. 232a, 254a-255a).

The Court of International Trade ("CIT") disagreed. It examined the enrichment contracts and concluded they were sales of services, not LEU. The CIT went on to hold that it could not reconcile Commerce's conclusions with a number of prior cases in which Commerce itself had determined that transactions in manufacturing services were not sales of subject merchandise. Specifically, the CIT noted that Commerce had previously recognized that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *USEC I*, 259 F. Supp. 2d at 1325 (Gov't App. 205a-206a). The CIT remanded the case to Commerce for reconsideration. *Id.* at 1331 (Gov't App. 219a).

In its remand determination, Commerce reaffirmed its prior conclusions, asserting that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Low Enriched Uranium from France Remand Redetermination* (June 23, 2003) at 52 (USEC App. 211a). On appeal, the CIT again rejected Commerce's approach, stating that:

> Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such

> sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

USEC Inc. v. United States, 281 F. Supp. 2d 1334, 1340 (Ct. Int'l Trade 2003) (Gov't App. 45a-46a). The parties thereafter obtained an order from the CIT permitting an interlocutory appeal, pursuant to 28 U.S.C. § 1292(d)(1), on the issues relating to Commerce's proposed treatment of contracts for manufacturing services as contracts for the sale of merchandise.

The Federal Circuit affirmed the CIT's conclusion that enrichment services transactions are not sales of goods. *Eurodif I*, 411 F.3d 1355 (Gov't App. 8a-28a). It agreed that the enrichment contracts "do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 1362 (Gov't App. 20a). The Federal Circuit concluded that enrichment transactions therefore were not "sales" of merchandise under the antidumping law, because "the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.* (Gov't App. 20a). The court also observed that in a recent case arising under the Contracts Disputes Act, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), it had agreed with the Government's position that uranium enrichment contracts were sales of services. The Federal Circuit found the reasoning in that

decision persuasive regarding the nature of the contracts, although it noted that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1663-64 (Gov't App. 21a, 23a-24a).[10]

The Government and USEC sought rehearing and rehearing *en banc*, and brought to the attention of the Federal Circuit this Court's decision in *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

The Federal Circuit denied rehearing *en banc*, and granted rehearing for the limited purpose of addressing the application of *Brand X*. In its rehearing decision, the Federal Circuit emphasized that it had not relied on *Florida Power* as binding precedent. To confirm its decision complied with *Brand X*, the Federal Circuit clarified that "the antidumping duty statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005) *("Eurodif II")* (Gov't App. 33a). The Federal Circuit further noted its original decision's holding that the

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10 The Government itself argued to the Federal Circuit that *Florida Power* was relevant and supported Commerce's determination because in *Florida Power* the Federal Circuit had stated that its decision on the nature of the enrichment contracts was a difficult one. Gov't Pet. at 15.

provision of services clearly was not covered by the antidumping law, and affirmed its conclusion that "Commerce's characterization of the SWU contracts at issue in this case would contradict ... the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods." *Id.* (Gov't App. 33a).

On remand, Commerce removed the enrichment transactions from its calculations, but initially resisted excluding LEU imported pursuant to enrichment services transactions from the antidumping order. *Final Results of Low Enriched Uranium from France Remand Redetermination* (Mar. 3, 2006) at 4-5 (USEC App. 323a-325a). On appeal, the CIT held that because such LEU is never sold, Commerce was required to exclude such imports from the scope of the antidumping order. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351, 1354-57 (Ct. Int'l Trade 2006) (USEC App. 327a-339a). In the subsequent remand determination, Commerce modified the scope of the antidumping order accordingly, and issued a form by which Eurodif and the utilities could certify that specific imports met the conditions for exclusion. *Final Results of Low Enriched Uranium from France Remand Redetermination* (June 19, 2006) at 1 (USEC App. 341a).

After the CIT affirmed the remand results, the Government and USEC appealed to the Federal Circuit the limited question of whether Commerce should be required to exclude imports under enrichment contracts immediately or only after Commerce conducted further factual analysis. The

Federal Circuit dismissed the appeal as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007) (Gov't App. 2a). The Petitioners then sought review in this Court of the Federal Circuit's decision in the interlocutory appeal issued in 2005.

ARGUMENT

A. This Case Involves Only A Routine Application Of The *Chevron* Standard Of Deference

The Federal Circuit held that the antidumping statute unambiguously applies to the sale of goods and not to sales of services. *Eurodif II*, 423 F.3d at 1278 (Gov't App. 33a). That holding satisfies the threshold test of *Chevron* and *Brand X*. Having found no ambiguity, the Federal Circuit applied the plain meaning of the statute and no deference was due Commerce. Even if the Federal Circuit had erred – and it did not – this case does not raise any issue of administrative law not previously addressed by this Court.

Faced with the Federal Circuit's clear holding, the Petitioners attempt to divert attention from the actual substance of the Federal Circuit's ruling and the applicable precedents. Both Petitioners argue that the meaning of "sold" is ambiguous, and cite to cases arising under different and irrelevant regulatory regimes in support of an argument that Commerce should be given broad discretion in interpreting that word. Gov't Pet. at 18; USEC Pet. at 21. Neither mentions that, as discussed below, the Federal Circuit previously and correctly applied

Chevron in interpreting precisely that same word, nor that the Federal Circuit relied on that prior decision in making its holding in this case.

Specifically, in *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), Commerce treated as "sales" free samples given by a foreign manufacturer to some of its U.S. customers, thereby placing squarely at issue the meaning of the word "sold" in section 1673. In *NSK* the Government argued, as it does here, that not deferring to Commerce's interpretation would create a loophole in the antidumping law. *Id.* at 972. As part of a detailed analysis, the Federal Circuit held that "Congress intended to give the term its ordinary meaning ...." *Id.* at 974. It also stated that "contrary to the Government's suggestion, we do not believe that the term 'sale' should be given any special meaning under the antidumping laws." *Id.* The Federal Circuit concluded "[t]he terms of the statutory provisions are clear on their faces and we see no reason to depart from the ordinary meaning of the term 'sold' or 'sale'. We thus need not reach the second prong of the *Chevron* analysis." *Id.* at 975.

In the instant case, the Federal Circuit expressly relied on *NSK* for its principal holding, as follows:

> [T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of

> ownership" required for a sale under *NSK* is not present here.

Eurodif I, 411 F.3d at 1362 (Gov't App. 20a). Because the holding in *NSK* was based on a finding that the statute was unambiguous, the requirements of *Brand X* were satisfied. Accordingly, there was no requirement for the Federal Circuit to defer to Commerce's interpretation of "sold" under the second prong of *Chevron*.

In its decision on rehearing, the Federal Circuit further reinforced its holding by stating as follows:

> We now clarify by stating expressly that the antidumping duty statute unambiguously applies to the sale of goods and not services. In our opinion, we stated that "under the statutory scheme adopted by Congress, the sale of goods (or 'merchandise') is covered by the antidumping duty statute" but that the "provision of services, however, is not ...." *Eurodif I*, 411 F.3d at 1361. While we did not use the term "unambiguous", we clearly foreclosed any argument that § 1673 is ambiguous on the precise question of whether the antidumping duty statute encompasses contracts for services. It undoubtedly does not.

Eurodif II, 423 F. 3d at 1278 (Gov't App. 33a).

USEC's complaint that the Federal Circuit improperly relied on *Florida Power* contrary to *Brand X* is misplaced, because the Federal Circuit expressly stated that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1363 (Gov't App. 21a). Recognizing that *Florida Power* did not arise under the antidumping statute, the Federal Circuit found *Florida Power* instructive on the nature of the contracts because it involved contracts for uranium enrichment services, and because in *Florida Power* the Government itself had argued successfully that the contracts were for services. *Id.* at 1363-64 (Gov't App. 21a-24a). *Brand X* is not implicated by the Federal Circuit's reference to *Florida Power*.

Crucially, both the Government and USEC now acknowledge that the antidumping statute applies only to the sale of goods. Gov't Pet. at 3; USEC Pet. at 5.[11] In an effort to evade that limitation, however, they rely on an individual contract provision taken out of context to allege that

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[11] USEC argues that a completely separate statute applying to a different subject – international trade negotiations – should be interpreted to override the plain meaning of "services" and limit it to activities not involving manufacturing. USEC Pet. at 28. However, the statute cited by USEC, 19 U.S.C. § 2114b(5), is not part of the antidumping statute. Moreover, the U.S. Government itself has included "services incidental to manufacturing" (such as the manufacture of nuclear fuel on a fee or contract basis) within the scope of the negotiations on energy services in the World Trade Organization's General Agreement on Trade in Services. *See* Communication from the United States to the Council on Trade in Services, S/CSS/W/24 (Dec. 18, 2000) *available at http://docsonline.wto.org/DDFDocuments/t/S/CSS/W24.doc*.

the provision of uranium feedstock for enrichment is a type of barter or payment-in-kind transaction. Gov't Pet. at 22-23; USEC Pet. at 26.[12] Contrary to the Government's assertion that the utilities do not own the LEU until it is delivered to them, Gov't Pet. at 21, the contracts make clear that the utilities are deemed to receive back their own uranium, and that uranium is never owned by the enricher. *Eurodif I*, 411 F.3d at 1362 (Gov't App. 20a) ("In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to the vested in the enricher during the relevant time periods that the uranium is being enriched."). Indeed, both the CIT and the Federal Circuit rejected Commerce's strained view of the contracts, finding that they are clearly purchases of enrichment and not LEU. For that reason, the Petitioners now ask this Court to analyze the Petitioners' hypotheses about the nature of specific contract provisions, and to construe whether it is

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[12] The characterization of enrichment services contracts as barter transactions was contradicted not only by the plain terms of the contracts, but also by the fact that the enrichers never know the value of the uranium feedstock provided by the utilities. For that reason, Commerce was forced to invent a price for the LEU in its determination. It stated that "[i]n assigning a specific monetary value to the natural uranium component, we estimated the market value," and "[f]or SWU contracts, when comparing [prices of LEU], we valued natural uranium using exactly the same value for both sides of the equation." *Low Enriched Uranium from France Final AD Determination*, 66 Fed. Reg. at 65,885 (Gov't App. 257a). Thus, in making its dumping calculations, Commerce relied on fictional values for the uranium contained in the LEU, applied an equation that cancelled out the uranium values entirely, and based its price comparisons on the sales of enrichment services.

significant that uranium feedstock is a fungible input. These are not issues of broad legal or factual application. They are specific to the nuclear fuel industry, and not appropriate for review by this Court.

The Petitioners seek to avoid the fundamental point that because enrichment contracts involve only the purchase of a manufacturing service and not the enriched uranium as a whole, there can be no "sale of merchandise" within the meaning of the antidumping statute. As discussed above, Commerce has consistently viewed transactions in manufacturing services as not involving a sale of goods subject to the antidumping statute.[13] In this case, Commerce is attempting to create a unique exception to its own regulations, and the antidumping statute itself, to treat enrichment services as sales of LEU. However, Commerce may not create new restrictions on transactions in manufacturing services without statutory authorization from Congress.[14] For the Federal

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[13] For example, in *Taiwan Semiconductor*, 143 F. Supp. 2d at 966, the CIT affirmed Commerce's determination that the sale of manufacturing services is not a sale of the goods being manufactured. Commerce's regulation on contract manufacturing, as applied in that case and others, derives from the statutory requirement that a finding of dumping be based on sales of merchandise – the same requirement the Petitioners now seek to evade.

[14] The Government acknowledges that an effort is currently being made to enact special legislation targeting enrichment services transactions. Gov't Pet. at 26 n.4. That effort reflects a recognition that the antidumping statute does not reach manufacturing services such as uranium enrichment.

Circuit to reject Commerce's attempt to do so in this case is entirely consistent with the standard of review provided by this Court under *Chevron* and *Brand X*.

B. The Facts Of This Case Are Narrow And Unique

As discussed above, the manner in which nuclear reactor assemblies are made and purchased is unique, in that the imports of LEU are not sold but rather are consumed by the utilities that arranged for their production. The Petitioners' argument that this unique situation creates a "loophole" in the antidumping statute is wholly unfounded, for two reasons.

First, there has never been an allegation that the utilities restructured their contracts to evade the antidumping law. The method of contracting separately for enrichment services was originally mandated by the U.S. Government in the 1960s, almost 40 years before the antidumping proceeding was initiated. The CIT specifically addressed this issue, finding that "[t]he contract here is not simply a restructured purchase contract." *USEC I*, 258 F. Supp. 2d at 1322 n.12 (Gov't App. 198a).

Second, the examples given by the Government and *amicus curiae* Committee to Support U.S. Trade Laws ("Committee") of products that could be contract-manufactured abroad for sale in the United States – such as steel, lumber, pasta,

textiles, and semiconductors[15] – are all readily captured under the existing statute and regulations, which are left undisturbed by the decision of the Federal Circuit in this case. Indeed, in the *Taiwan Semiconductor* case discussed above, sales of the imported semiconductors by the U.S. importer (as opposed to sales of manufacturing services by the Taiwanese service provider to the U.S. importer) were included in the scope of the proceeding. Moreover, Commerce has previously applied its doctrine that sales of manufacturing services are not sales of merchandise in cases involving steel and pasta, as well as in another case involving semiconductors.[16] The ultimate sales of those products in the United States were in each case within the scope of the antidumping statute, because the merchandise was actually sold.[17]

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15 Gov't Pet. at 25; Committee Br. at 7-10.

16 *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853 (Dep't of Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value); *Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40,449 (Dep't of Commerce July 29, 1998) (notice of final determination of sales at less than fair value); *Certain Pasta from Italy*, 63 Fed. Reg. 53,641 (Dep't of Commerce Oct. 6, 1998) (prelim. results of new shipper antidumping duty admin. review), *aff'd*, *Certain Pasta from Italy*, 64 Fed. Reg. 853 (Dep't of Commerce Jan. 6, 1999) (final results of new shipper antidumping duty admin. review); *DRAMS from Taiwan*, 64 Fed. Reg. 56,308.

17 The antidumping statute also contains provisions to ensure that sales of imported products can be captured when the merchandise is incorporated into other products before it is sold in the United States. 19 U.S.C. 1677a(e).

Under the existing law – unaffected by the Federal Circuit's decision – if a broker were to sell imported LEU for which it had contracted production, that sale would be subject to the antidumping statute. But that is not the situation at issue here, and neither the Petitioners nor the Committee has identified another industry in which U.S. companies arrange for foreign contract production of merchandise that they consume themselves. That is not the situation for foreign-made steel products, lumber, pasta, textiles or semiconductors, all of which are sold after importation into the United States.

In sum, while the Petitioners argue that the *Eurodif* decisions must be overturned to prevent a loophole in the antidumping law, no such loophole exists. In every other case identified by the Petitioners, the imported goods are subject to the antidumping law because those goods are eventually sold. The Petitioners simply seek to twist a statute of general applicability out of shape in order to achieve a specific result tailored to the facts of one particular – and unique – industry. Such a results-driven application of the law is not a legitimate basis for legal interpretation, and certainly not sufficient justification for the granting of certiorari.

C. The Petitioners' Characterizations Of "Foreign Policy" And "National Security" Interests Are Factually Incorrect And Inapposite

The Petitioners argue that there are several non-legal policy reasons why the Court should grant

certiorari, primarily claiming that the Federal Circuit's decision threatens national security, U.S. energy policy, and the financial well-being of a publicly held company, USEC. Gov't Pet. at 25-32; USEC Pet. at 32-37. Those policy arguments are all based on the projected effect of this case on a different case: an antidumping proceeding involving imports of uranium from Russia.

An import restriction imposed under the antidumping statute in the Russian uranium proceeding prohibits utilities from purchasing enrichment services directly from the Russian enricher. Meanwhile, USEC serves as the U.S. "executive agent" of Russian enrichment services provided under the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-Russ., Feb. 18, 1993, State Dep't No. 93-59, 1993 WL 152921 (hereinafter "HEU Agreement"). The HEU Agreement is a government-to-government arrangement under which Russia has committed to sell the enrichment services associated with LEU that has been "downblended" from weapons-grade uranium. USEC has been given the exclusive right to resell the enrichment services supplied by Russia under the HEU Agreement as the U.S. "executive

agent" (*i.e*, broker) for the HEU Agreement.[18] According to the Petitioners, using the antidumping statute to prevent the utilities from contracting directly with the Russian enricher preserves "market conditions" that encourage Russia to comply with its obligations under the HEU Agreement.

The Petitioners' policy argument presumes, without providing any evidentiary support, that there is a significant risk that Russia will abandon its treaty obligations under the HEU Agreement. They also allege that Russia is capable of selling substantial additional amounts of commercial enrichment services to the United States, but that

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[18] Although the Petitioners appear to suggest otherwise, USEC is not the only company capable of serving as the broker of Russian enrichment services provided under the HEU Agreement. In 1999 USEC announced it was considering withdrawing from that role. When other companies -- including members of AHUG – proposed to take over or supplement USEC's role as the executive agent, USEC opposed those proposals and reclaimed the position for itself. Accordingly, its role as the executive agent is voluntary.

specific issue is contested and currently is *sub judice* in the CIT.[19]

Regardless, the U.S. utilities continue to fully support the HEU Agreement, which could not exist absent the utilities' purchases of the Russian enrichment services provided to them through USEC. Nonetheless, when the HEU Agreement expires in 2013, there will be a significant shortfall in the available supply of enrichment services, and utilities must have access to sufficient supplies to ensure the continued reliable operation of domestic nuclear plants. No full replacement for the enrichment services currently obtained under the HEU Agreement has been identified.

The Government also claims that it relies on USEC "to supply enriched uranium for a variety of military purposes," and that USEC "is the sole

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19 *Ad Hoc Utilities Group v. United States*, No. 06-00229 (Ct. Int'l Trade appeal docketed July 6, 2006) (appealing Commerce determination); *Ad Hoc Utilities Group v. United States*, No. 06-00300 (Ct. Int'l Trade appeal docketed Sept. 6, 2006) (appealing International Trade Commission determination); *Nukem v. United States*, No. 06-00298 (Ct. Int'l Trade appeal docketed Sept. 6, 2006) (appealing International Trade Commission determination). In the proceedings involving Russia – which are not part of the record of this case and not before the Court – there is evidence that Russia's enrichment capacity is already substantially occupied and that in any event, U.S. utilities are already largely committed under long term purchase contracts that extend beyond the expiration of the HEU Agreement. *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (Second Review) (Aug. 2006) at 42, 44 (Comm. Lane, dissenting) and II-18, *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/index_opinions/index.htm#2006.

supplier of the LEU used to fuel the government-owned nuclear reactors that produce tritium," which is used in nuclear weapons. The Government further asserts that USEC supplies enriched uranium for the space program and for submarines and aircraft carriers. Gov't Pet. at 30. However, although the Government is silent on the issue, USEC acknowledges that it does not own the enrichment facility at Paducah. USEC Pet. at 6. Rather, USEC leases the facility from the Government, which operated it for many years (until USEC was privatized in 1998) and is able to do so again.

Moreover, the Department of Energy ("DOE") itself has indicated that it has a major surplus of weapons-grade uranium. On March 12, 2008, DOE issued a press release addressing "the management of [its] excess uranium inventory." DOE stated that it "has a significant inventory of . . . uranium that is excess to U.S. defense needs." DOE also explained that, because the costs of maintaining the inventory are high, it plans to dispose of excess uranium through commercial or other transfers, while still "maintain[ing] sufficient uranium inventories at all times to meet the current and reasonably foreseeable needs."[20]

It therefore appears unlikely that the financial performance of USEC could have any relationship to U.S. national security. Even if it did, the Petitioners' suggestion that the antidumping

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[20] DOE Press Release, DOE Announces Policy for Managing Excess Uranium Inventory, (Mar. 10, 2008), *available at* http://www.energy.gov/news/6069.htm.

statute should be manipulated to assist USEC – a private company – in raising capital in the commercial markets is certainly not a valid justification for certiorari. It is within the power of the U.S. Congress to enact legislation granting USEC a financial subsidy, but that is not a subject within the scope or intent of the antidumping statute.

With regard to energy policy, the Petitioners' assertion that allowing utilities to purchase Russian enrichment services without going through USEC would increase dependence on foreign energy sources is questionable. USEC itself has for many years chosen to commit most of its own output of enrichment services to contracts with foreign utilities, while delivering Russian services to U.S. utilities as a broker. The real threat to U.S. energy policy arises from the increasing costs now faced by utilities resulting from limited supplies of the components and services needed to produce nuclear fuel, and the potential impact of those limited supplies on current plans for construction of the additional nuclear reactors needed to supply America's steeply growing energy needs. In any event, these are the type of policy disputes that this Court is ill-equipped to resolve.

In addition, it should be noted that USEC soon will not be the only source of enrichment services in the United States. The construction of another U.S. enrichment facility by Louisiana Energy Services ("LES") is underway, and it is expected to be operational in 2009. Reflecting the high demand for and limited supply of worldwide

enrichment services capacity, the entire enrichment output of the LES facility for its first ten years of operation is already committed under contracts with utilities. Other new enrichment facilities are in the planning stages. Utilities will continue to purchase significant amounts of enrichment services from U.S. sources, including USEC, under long term contracts.

Perhaps most important, the antidumping statute is an instrument of trade policy with general application to all industries, and not a tool for the implementation of national security or energy policies. There is simply nothing in the Tariff Act of 1930 indicating that Congress intended it to be interpreted in a special manner for purchases of uranium enrichment services. The policy concerns raised by Petitioners are not within the purview of the antidumping law, and do not provide a valid basis for seeking certiorari to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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